SPECIAL COURT FOR SIERRA LEONE

TRIALS CHAMBER

Before: Judge Benjamin Mutanga Itoe, Presiding Judge
Judge Pierre Boutet
Judge Bankole Thompson

Registrar: Robin Vincent

Date: 27 September 2004

THE PROSECUTOR

v

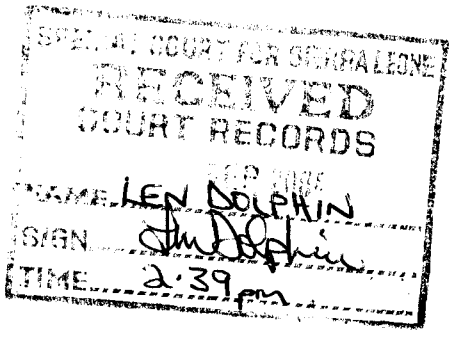
SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

CASE NO. SCSL-2004-14-T

NORMAN AND FOFANA

JOINT REQUEST FOR VARIATION OF PROTECTIVE MEASURES OF PROSECUTION WITNESSES PURSUANT TO RULE 75(G-I)

Office of the Prosecutor:
Luc Côté
James C. Johnson



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Background

1. On 8 June 2004 the Trial Chamber's "Decision on Prosecution Motion for Modification of Protective Measures for Witnesses" was issued in response to the "Prosecution Motion for Modification of the Prosecution Motion" dated 14 May 2004.

The Law

2. Article 17(2) of the Statute of the Special Court for Sierra Leone ("the Statute") is of paramount importance and provides that "[t]he accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. Rule 79 on closed sessions for the protection of witnesses states:

   (A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of: (i) national security; or (ii) protecting the privacy of persons, as in cases of sexual offences or cases involving minors; or (iii) protecting the interest of justice from prejudicial publicity.

   (B) The Trial Chamber shall make public the reasons for its order.

   (C) In the event that it is necessary to exclude the public, the Trial Chamber should if appropriate permit representatives of the press and/or monitoring agencies to remain.

4. The protective measures already adopted were made for every witness on the list of Prosecution witnesses disclosed to the Defence and were made in accordance with Rule 75(A) of the Rules of Procedure and Evidence ("the Rules") which provides that "A Judge or Chamber may, on its own motion, or at the request of either party ... order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused."

5. Rule 75(B) provides a variety of different protective measures to be afforded to the witness. The list does not mandate protective measures, it only provides examples of protective measures that can be provided, "consistent with the rights of the accused."

Once again, the Rule requires a balancing of interests.

6. Rule 75 was adopted under Art. 17(2), "Measures for the Protection of Victims and Witnesses." Rule 75, however, is in tension with the right to a public trial.

In *Tadic* the ICTY stated that

> "The benefits of a public hearing are well known. The principal advantage of press and public access is that it helps to ensure that a trial is fair.... In addition, the International Tribunal has an educational function and the publication of its activities helps to achieve this goal. As such, the Judges of this Trial Chamber are, in general, in favour of an open and public trial."[1]

This is, the Defence submits, the essence of "transparent justice" and the universal concept that a trial must not only be fair, it must appear to be fair.

7. The Defence submit, however, that protective measures should be made a matter of proof by the Prosecution, where it carries the burden of proof as to the least restrictive measure required for **each** witness it brings forward. The ICTY has affirmed that protective measures are to be granted only in exceptional circumstances and on a case-by-case basis[2] where it is difficult to persuade a witness to come forward otherwise.[3] "Case-by-case" basis, we submit, means "witness-by-witness." Thus far, thirteen witnesses have testified in this case, and every one has had his or her identity withheld from the public, and one testified in closed session, and half of another's cross-examination was in closed session.

Submissions

8. The Defence submits that, since the Decision, circumstances surrounding evidence in support of protective measures has changed dramatically such that the protective

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[1] *Prosecutor v Tadic,* Protective Measures Decision, para. 32 (10 August 1995).
[2] *Prosecutor v Anto Furundzija*, Case No. IT-95-17/1, "Decision on Prosecutor's Motion requesting Protective Measures for Witnesses 'A' and 'D' at trial" 11 June 1998, paras 7-8.
[3] Kittichaisaree, Kriangsak "International Criminal Law" (2002), p 300.

measures afforded to witness should be reviewed and in some specific cases, changed. [4]

9. The Prosecution's initial concerns that formed the basis of the Prosecution Motion included fear of retaliation from the Accused or their friends. However, the fact remains that every witness who has testified has had his or her identity disclosed to the Accused. This shows that the Prosecutor's original objections to disclosure to the Accused were unfounded. The identity of witnesses have been long known to the Accused and their defence teams currently conducting investigations and talked to several prosecution witnesses. Witnesses who testified in mid-June have now been known to the Accused for more than four months. No retaliation or retribution has occurred to them. Thus, the Prosecution's initial concerns expressed in the Prosecution Motion have proven to be unfounded now that the trial is underway. This is a changed circumstance.

10. The Defence submits that there is no eligibility requirement for protective measures[5] except a genuine fear that disclosure of the witness' identity or giving public testimony may put the particular witness in danger or at risk[6]. The question of whether such danger or risk exists should, again, be examined on an individual basis[7] according to an objective test.[8]

11. Exceptional circumstances and objective fear are the two necessary conditions for an order under Rule75(A). These circumstances must go beyond the prevailing situation in Sierra Leone when the Special Court was established and the Rules drafted.[9] The

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[4] *Prosecutor v Nyiramasuhuko et al.* "Decision on the Prosecutor's Motion for, inter alia, Modification of the Decision of 25 September 2001" para 11.
[5] The "reliability of witnesses, including any motive they may have to give false testimony is an estimation that must be made in the case of each individual witness": *Tadic* Sentencing Judgment, 7 May 1997 para 541
[6] ICTY, Trial Chamber II, *Brdanin & Talic*, Decision on Third Motion by Prosecution for Protective Measures, IT-99036-PT, 8 November 2000, par. 13.
[7] Ibidem & Archbold, International Criminal Courts: Practice, Procedure and Evidence, Chap. 8, Sect. III, par. 8-64a-c.
[8] ICTR, Trial Chamber II, *Rwamakuba*, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, ICTR-98-44-T, 22 September 2000, par. 10.
[9] ICTY, Trial Chamber II, *Brdanin & Talic*, Decision on Motion by Prosecution for Protective Measures, IT-99-36-PT, 3 July 2000, par. 11.

Prosecution bears the responsibility for showing such exceptional circumstances.[10] Further, applications for such measures should be on a case-by-case basis. [11] It is, therefore, not possible to establish the necessary exceptional circumstances for entire *categories* of witnesses, as done so by the prosecution.

12. In cross examination by Counsel for the Second Accused, witness TF2-159 stated that he was not afraid to come and give evidence at the Special Court and that the issue of protective measures were not discussed with representatives of the Court.

13. Witness TF2-151 testified that to being a tailor in Kenema, being publicly beaten and arrested multiple times, and he believed that any person from Kenema and who listened to his testimony would in fact know him. The witness confirmed that he was glad to come to court and tell the court what had happened to him and that he did not mind he felt he was "exposed". Why were protective measures necessary if his identity were to be so easily revealed in the examination in chief?

14. Witness TF2-032 stated in response to a question by Counsel for the Second Accused as to whether he was afraid "If I was a coward I would not be sitting here, I am not afraid."

15. Counsel for the First Accused asked witness TF2-033 "are you afraid for the public to see his face?" to which TF2-033 replied: "This is just for security, I am not afraid for anyone". When Counsel asked: "If the Court were to say stand up and remove the cage you would not be afraid?" witness TF2-033 replied "no".

16. Witness TF2-040 was the only witness who thus far has personally expressed a legitimate fear of reprisal if his identity were made known to the public.

17. In February 2004, counsel and investigators for the Second Accused interviewed witness TF2-082 who agreed that he would in fact testify **publicly** (*i.e.*, without

[10] *ibidem*, par. 16.
[11] *See*: Archbold, International Criminal Courts: Practice, Procedure and Evidence, Chap. 8, Sect. III, par. 8-64a.

protective measures) for the Second Accused. When his identity was disclosed to the defence twenty-one days before his expected date to testify, it was implied that the security conditions surrounding his safety had changed since February and that the Prosecution was privy to such information. On 10 September 2004 the Prosecution applied that the witness's evidence be held in a closed session. The Prosecution specifically asserted that matters had altered significantly in the seven months since the Defence team for Fofana had interviewed him. Such an assertion, however, was not even supported by the witness's testimony.

18. On 15–17 September 2004, TF2-082 testified in closed session. He was an "insider" whose name had been testified to by two prior witnesses as being the CDF Battalion Commander in Koribundo. On cross-examination by Stand-by Counsel for the First Accused he agreed with the first paragraph of his written statement that "I would answer in the middle of the street" and that any concern he had with respect to testifying was premised only on his presence in Freetown as a stranger. He testified that he did not have any fear of reprisals. The Defence submitted in oral submissions that such fear is only the apprehension of being in the strange environment of Freetown and the Court. This was not a fear sufficient to justify the significant imposition of protective measures and the order to conduct testimony in a closed session. Upon re-examination by the Prosecution it was elicited that the witness had been questioned, prior to the imposition of protective measures, about any fears he may have. He answered "I remember saying I was concerned... about my mother." The specific nature of this concern was not developed (for instance whether it arose from him having been in Freetown for a total of 90 days before testifying and thus leaving his mother at home), nor was any testimony of such a concern being actually held (rather than merely re-counted to the prosecution).

19. The Defence submits that protective measures for TF2-082 were unnecessary and that his testimony should have been given in an open session and his identity made known to the public. Accordingly, the Defence's primary submission is that the witnesses identity and his testimony be made available publicly, albeit after the fact, by release of the transcript.

20. Further or alternatively, in the event of the Chamber ruling against the primary contention of the Defence cited above, it is submitted that the transcript of the proceedings ought to be made public, but with such appropriate redactions.

21. The Defence further submits that the testimony of TF2-082 contained significant exculpatory evidence concerning the guilt of the accused, and its absence from the public domain can only leave a misleading public perception of what the testimony has been as a whole. It is a fundamental principle of the rule of law that justice must not only be done, but it must also be seen to be done.

22. As Judge Boutet noted from the bench at the Friday, 17 September 2004 during motions hearing, this is the first international tribunal to be held in the same country where the events transpired. Two consequences of this *in situ* trial are that it requires a more sensitive inquiry on the requirements for the protection of witnesses and a more sensitive inquiry into the public nature of the trial. A trial at the ICTY is far removed from the site of the conflict, and daily court proceedings may remain largely unknown to the public. In contrast, the trial in Sierra Leone is well attended by the public prominently covered in domestic newspapers. Therefore, the people of Sierra Leone have a rare and vital opportunity to learn about the truth of their civil war from the people involved, testifying before their very eyes and ears. This trial is an important way for the people of this country to heal the wounds of civil war. Moreover, trial before an international criminal tribunal is not the same as a trial in a Sierra Leone criminal court because the elements of war crimes are vastly different than the underlying crimes. The public must be educated to this difference.

23. Accordingly, exculpatory evidence given by TF2-082 and insiders generally should be made available publicly, with appropriate redactions if necessary. It is apparent that this witness's testimony, as a whole, did not qualify for a closed session under Rule 79. If this insider's testimony remains secret, the public is left with an erroneous and one-sided interpretation of what happened in Sierra Leone over the course of the civil war. This not only affects public perception of this Court by providing an imbalanced history

but it also creates specific prejudice for the accused by denying the possibility of witnesses who hear the testimony coming forward and being able to controvert it.

24. The Defence submits that the necessary foundation for continuing protective measures have not been shown for all witnesses and that each witness must be assessed individually to see if such exceptional inroads into the principle of a public justice are to be permitted. It is submitted there must be a continuing obligation on the Trial Chamber to satisfy itself that the minimum interference with the statutory principle of a public trial is occurring at every stage of the trial process. It is submitted that such an obligation can be discharged by the Trial Chamber permitting a short *voir dire* prior to each witness giving evidence.

25. Further, the Defence note that some witnesses have testified that they did not themselves request protective measures but such measures were suggested by the Prosecution. This departs from the submissions made by the Prosecution and considered by the Trial Chamber when it decided that protective measures were necessary. It is submitted that while such a factor may not be decisive, a failure to ask for such measures is a cogent indication of whether the witnesses have genuine fears or whether the measure is in fact being imposed routinely and without due consideration such as would justify departure from the cardinal principle of fair and public trial. It is submitted that no witness is likely to refuse an offer of anonymity as it will always be preferable from the witness's perspective to give secret or anonymous testimony. It is submitted, however, that the apprehension associated with giving public testimony is appropriate and a necessary part of the witness being encouraged to give truthful testimony which goes to the heart of notion of a fair trial.

26. It is submitted that exceptions to the right of the accused and public to a public trial should not be made without significant justification after credible enquiry and can never be properly determined as merely amounting to a matter of preference for each witness.

27. The Defence recognises that there is a conflict between the right of the public to know and the right of the accused to a fair trial, and the importance of witness security.

However the defence submits that there is a cumulative, prejudicial effect on the accused through the provision of protective measures and the non-disclosure to the public, to their right to a fair trial for the following reasons:

a. Witness testimony that is revealed to the public provides an incentive to that witness to tell the truth because it may be publicly contradicted; and
b. The public, in hearing comprehensive testimonies, may then come forward to the Defence, if they consider that may come provide direct, relevant information in either support or contradiction of previous testimonies.

This fundamental principle of the public trial, namely the encouragement it provides to witnesses for telling the truth is all the more important where the Court is assessing the veracity of events to which the accused were not present.

28. The Defence further submits that the Chamber under Rule 75(G) is not bound by its prior rulings and there is an ongoing obligation to ensure the rights of the accused and the public to know.

29. The Defence rejects the Prosecution's oral argument that it is too late for the protective measures or effects of the closed session to be altered. Protective measures should always be continually subject to review, as the facts bear out. Rule 75(G) contemplate later changes. Rather, and as has occurred both at the ICTY and ICTR[12] (*Baraguiza,* from ICTR contemplates this), the Defence requests that the identity of TF2-082 and/or that the transcript of his oral testimony be made public. Further, the Defence submits that the Trial Chamber should not be persuaded by Prosecution's oral arguments that amount to assertions of unfairness to a witness to retrospectively remove protective measures. The issue for the Trial Chamber is fairness to the accused and that of security as regards the witness, the former being paramount.

30. While the Defence recognises that the Trial Chamber may be appropriately and

[12] *Prosecutor v Kunarac* "Order on Prosecution's Motion Requesting Protective Measures for Witnesses at Trial" 5 October 1998, para 9; *Prosecutor v Tadic* "Order for Protective Measures in the Matter of Allegations Against Prior Counsel" 12 October 1999, para 2; *Prosecutor v Simic et al*, "Order for Protective Measures in the Matter of Allegations Against an Accused and his Counsel" 30 September 1999, para 2.

continually consulted by the Victim and Witness Support of the Special Court ("the VWS") in the determination of protective measures,[13] the Defence submits that the final decision regarding the provision of protective measures rests with the Trial Chamber and not the VWS as it is the Trial Chamber which is statutorily \harged with ensuring a fair trial. The VWS is not charged with such duty.

Application

31. The Accused persons seek to the following relief from the Trial Chamber:

a. The testimony of TF2-082 should be unsealed and be disclosed to the public and press, including posting it on the court's website. The burden should be on OTP and VWS to show what, if anything, must remain private and subject to redaction.

b. Every witness testifying hereafter should be subject to a voir dire on protective measures, and the Court should rule on each individual case before hearing testimony as to the events in question.

c. The identities of TF2-033 and TF2-040, police officers already known in Kenema should be revealed.

d. The identifies of the above mentioned witnesses should be revealed as they have testified that they did not request protective measures, nor were afraid that their identities be known.

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[13] Rule 69(B) of the Rules.

INTERNATIONAL CRIMINAL LAW

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the Court shall have regard to all relevant factors, including age, gender, health, religion, and the nature of the crime, in particular, but not limited to, whether the crime involves sexual or gender violence or violence against children.

(2) Protection before trial

8–64a It is not permissible for the Prosecution to redact the names and identifying features of witnesses before the supporting material of an indictment is disclosed to the accused under Rule 66(A) (i) without the Trial Chamber's authority to do so. The Prosecution is required to apply to the Trial Chamber under Rule 69 if it wishes to not disclose the identity of witnesses to the defence. Absent specific evidence of the risk that particular witnesses will be interfered with, the extraordinary measures provided by Rule 69 cannot be justified. The assessment of risk and danger must be done on a witness by witness basis, and the Prosecution bears the onus of establishing "exceptional circumstances". (See, *Prosecutor v. Brdanin*, Decision on Motion by Prosecution for Protective Measures, July 3, 2000, paras 13, 16–18, and 22–28.)

Where the likelihood that a particular victim or witness may be in danger or at risk has in fact been established, the Trial Chamber will limit the rights of the accused to the extent that the identity of the victim or witness will not be disclosed to the defence until such time to provide adequate time for the defence to prepare before trial. (See, *Brdanin* decision, paras 31–32; and, *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, August 10, 1995, para. 72.)

Exceptional circumstances

8–64b The prevailing circumstances in the former Yugoslavia cannot by themselves amount to exceptional circumstances. As was held in the *Brdanin* decision:

> "This Tribunal has always been concerned solely with the former Yugoslavia, and Rule 69(A) was adopted by the judges against a background of ethnic and political enmities which existed in the former Yugoslavia at that time. The Tribunal was able to frame its Rules to fit the task at hand; the judges who framed them feared even at that time that many victims and witnesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences which their testimony could have for themselves or their relatives. Accordingly, the use by those judges of the adjective 'exceptional' in Rule 69(A) was not an accidental one. To be exceptional, the circumstances must therefore go beyond what has been, since before the Tribunal was established, the rule—or the prevailing (or normal) circumstances—in the former Yugoslavia" (para. 11).

Also see, *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, August 10, 1995, para. 23; and, *Prosecutor v. Blaskic*, Decision on the Application of the Prosecutor dated October 17, 1996 requesting protective measures for victims and witnesses, November 5, 1996, para. 24.

Protection of witnesses in one case cannot be justified by the fear that the prosecution may have difficulties in finding witnesses who are willing to testify in future cases (*Brdanin* decision, para. 30).

The test

8–64c The Prosecution must show that the disclosure to the accused and his defence team of the identity of a witness at this stage, despite the obligation imposed upon the accused and his defence team not to disclose it to the public, may put the

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In practice, protective measures include use of pseudonyms, non-disclosure of witness identities to the media and the public, giving evidence via video-conference link, accommodating witnesses during their presence at the seat of the international tribunal in safe houses where medical and psychiatric assistance is available, giving testimony in closed session, use of image-distortion, and redaction.[58] While the protection of victims and witnesses may be permitted to affect the public nature of the trial, it must not be allowed to affect the fairness of the trial.[59] For example, trial testimony of a victim may have to be disclosed to the Defence to the extent that it is relevant for the preparation of the Defence's case, but without thereby jeopardizing the safety of the victim.[60]

A five-pronged balancing test has been adopted by the ICTY to determine whether anonymity is to be granted to a witness. Firstly, there must be real fear for the safety of the witness or his family. Secondly, the evidence to be furnished by the witness must be sufficiently relevant and important to the Prosecutor's case. Thirdly, there must be a lack of *prima facie* evidence that the witness is untrustworthy. Fourthly, there must be a lack of a witness protection programme. Finally, any measure taken should be strictly necessary.[61] The Defence normally needs to know the identity of a witness so that investigation of evidence by the Defence can be made in advance of the cross-examination of the witness, and this would not be possible if the witness' identity is not known. The five-pronged test has been subject to criticism.[62] In the circumstances where crimes against humanity, genocide, or war crimes are widespread, most of the five conditions would be satisfied. This is despite the affirmation by the ICTY that protective measures are to be granted only in exceptional circumstances and on a case-by-case basis.[63] It is very difficult to persuade a witness to come forward. If one does come forward, there may not be *prima facie* evidence to indicate the untrustworthiness of the witness. An example is the case of 'Witness L' or Dragran Opacic, a star witness in *Tadic*, who testified that the accused committed murder and rape and that the witness was himself present when the accused killed the witness' father. His evidence was discredited only when his father turned up in court.[64]

In all, short of an effective witness protection programme that would permit the witness's identity to be known to the Defence prior to the disappearance of the

[58] See, e.g., *Furundzija*, paras. 16, 20, 28, 31; *Akayesu*, para. 143; *Tadic* Judgment, paras. 21, 29, 30–2.

[59] *Furundzija*, para. 93.

[60] Ibid., para. 31.

[61] *Prosecutor v. Dusko Tadic*, Case No. IT-94-I-T, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 10 Aug. 1995, paras. 62–6. Followed in *Prosecutor v. Tihomir Blaskic*, Case No. IT-95–14, ICTY T. Ch. I, Decision on the Application of the Prosecutor dated 17 Oct. 1996 requesting Protective Measures for Victims and Witnesses, 5 Nov. 1996, para. 41.

[62] See M. Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused' (1996) 90 *AJIL* 235; C. M. Chinkin, 'Due Process and Witness Anonymity' (1997) 91 *AJIL* 75; M. Leigh, 'Witness Anonymity Is Inconsistent With Due Process', ibid., 80.

[63] *Prosecutor v. Anto Furundzija*, Case No. IT-95–17/1, Decision on Prosecutor's Motion requesting Protective Measures for Witnesses 'A' and 'D' at trial, 11 June 1998, paras. 7–8.

[64] See G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Penguin, 1999), 291–2.